Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

ROBERT PAUL McNASPY,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

On Petition For A Writ Of Certiorari To The Fourteenth Court Of Appeals For The State Of Texas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the Sixth Amendment right to confrontation of witnesses waived by an accused's attorney's failure to object to the proceeding?

2. Is Texas Rule of Evidence 412 unconstitutional in that, unlike Federal Rule 412, after which it is patterned, it fails to allow an accused to confront witnesses against him contrary to the dictates of the Sixth Amendment to the United States Constitution?

OPINION BELOW

The opinion of the Court of Appeals is unreported. The judgment, findings, and conclusions of the district court are unreported.

JUDGMENT

The judgment of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him;" The Fourteenth Amendment to the United States Constitution provides in relevant part " . . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . . . "

STATEMENT

A. BACKGROUND

This case arose when the trial judge conducted an in camera hearing during the cross-examination of the complaining witness by counsel for the Defendant. Neither the accused nor his counsel were allowed in chambers

while the Judge conducted the examination of the complaining witness. Defendant's counsel did not object. This examination was conducted pursuant to Rule 412, Texas Rules of Evidence. The question presented is whether Texas Rule 412 is unconstitutional for allowing a procedure contrary to the mandate of the Sixth Amendment requiring that an accused be allowed to confront the witnesses against him. Please refer to Appendix 16a for the full text of Rule 412, Texas Rules of Evidence.

Defendant was charged with the felony offense of sexual assault. After a jury was seated and testimony begun, the complaining witness was called to testify by the State. During cross-examination, Defendant's counsel approached the bench, pursuant to Texas Rule 412, Texas Rules of Criminal Evidence, and requested permission to question the complaining witness regarding her prior sexual conduct as it was necessary to prove his defense of motive and bias. Pursuant to Rule 412, the trial judge examined the complaining witness in camera to determine the admissibility of the testimony. This examination of the complaining witness was conducted without the presence of the Defendant or Defendant's attorney. Defendant's counsel did not register an objection.

B. PROCEEDINGS BELOW

The Petitioner was tried and convicted in the 228th Criminal District Court of Harris County, Texas, of the offense of sexual assault and punishment was assessed by the jury at ten years confinement in the Texas Department of Corrections. This conviction was confirmed by the Court of Appeals for the Fourteenth District of Texas on

July 29, 1999. A Motion for Rehearing was overruled by the Court of Appeals for the Fourteenth District of Texas on October 21, 1999. A Petition for Discretionary Review was refused by the Court of Criminal Appeals for the State of Texas on April 12, 2000. Copies of these opinions are attached to this petition.

REASONS FOR GRANTING THE PETITION

This Court has jurisdiction over the Petition.

Concerning the Sixth Amendment Right of Confrontation, this Court held in *Brookhart v. Janis*, 384 U.S. 1, 16 L. Ed. 2d 314, 86 S. Ct. 1245 (1966), that the alleged waiver of a federally guaranteed constitutional right is a federal question controlled by federal law. Further, the Court stated that there was a presumption against the waiver of federal constitutional rights and, the Court continued, in order for a waiver to be effective, it must be clearly established that it was an intentional relinquishment or abandonment of a known right or privilege. Further, as this Court held in *Douglas v. Alabama*, 380 U.S. 415, 13 L. Ed. 2d 934, 85 S. Ct. 1074 (1965), the failure to object does not defeat a federally protected constitutional right. Thus, the failure of defense counsel to object did not waive Defendant's constitutional Right of Confrontation as provided by the Sixth Amendment and the Fourteenth Amendment to the Constitution of the United States.

This case arises out of the Texas "Rape Shield" statute, Rule 412, Texas Rules of Evidence, which requires a Defendant to inform the judge out of the presence of the

jury of his intention to introduce evidence regarding prior sexual conduct of the complaining witness. Rule 412 states in part "after this notice, the Court shall conduct an in camera hearing" to determine if the evidence is admissible. Rule 412 does not address the presence of the Defendant or his attorney during this examination of the witness. It is this fatal flaw in the rule which brings us to this Court. Rule 412 of the Texas Rules of Evidence is modeled after Rule 412 of the Federal Rules of Evidence. The Federal rule pointedly states in pertinent part " . . . the Court must conduct a hearing in camera and **AFFORD THE VICTIM AND PARTIES A RIGHT TO ATTEND AND BE HEARD."** (emphasis added). Thus, the right to confrontation of witnesses is preserved by the explicit wording of the Federal rule. Texas Rule 412, omitting this important portion of the Federal rule, appears to allow the trial judge to use his own judgment in allowing the attorney for the accused as well as the accused himself to appear or not appear in his chambers while he conducts the interrogation. If the judge elects to exclude them and defense counsel does not object, the accused is deemed by Texas law to have waived his Sixth Amendment right to confrontation. That is what occurred in the instant case. If counsel does object, the appeals court will reverse and remand because of the unconstitutional procedure allowed by Rule 412. This procedural trap which allows an unconstitutional rule to continue to violate an accused's Sixth Amendment right should not be allowed to trap the unaware. *See Sanchez v. State*, 702 S.W. 2d 258 (Texas Appeals, Dallas – 1986). This case was on all fours with the case before the Court and was reversed and remanded because the procedure violated the Sixth Amendment right to confront witnesses. If there

is no affirmative showing in the record that the Defendant affirmatively waived his right under the Sixth Amendment to confront the witnesses against him, then it has consistently been the holding of this Court that there was no waiver. *See McCarthy v. U.S.*, 394 U.S. 459, 22 L. Ed. 2d 418, 89 S. Ct. 1166 (1969).

Finally, this writ should be granted in order to prevent the State of Texas by its Rules of Evidence or otherwise from a slow chipping away at the rock of fundamental constitutional rights such as the Sixth Amendment right to confrontation of witnesses. Texas Rule of Evidence 412 holds itself out as following the Federal rule to help victims of rape from improper and harassing questions. However, it fails to balance the victim's protection with the protection of the accused because Rule 412 strips the accused of his Sixth Amendment rights. Therefore, Rule 412, Texas Rules of Evidence, must be found unconstitutional due to its clear violation of the accused's Sixth Amendment right of confrontation.

CONCLUSION

For the aforementioned reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Affirmed and Opinion filed July 29, 1999.

[SEAL]

In The

Fourteenth Court of Appeals

NO. 14-96-01317-CR.

ROBERT PAUL McNASPY, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 228th District Court
Harris County, Texas
Trial Court Cause No. 725203

OPINION

Appellant, Robert Paul McNaspy, was charged by indictment with the felony offense of sexual assault. *See* TEX. PEN. CODE ANN. § 22.011(a)(1)(A) (Vernon Supp. 1999). He was convicted and sentenced to ten years in the Texas Department of Criminal Justice, Institutional Division. Appellant challenges his conviction with four points of error. We affirm.

Background

In 1991, appellant moved into his former wife's house, and the couple began operating a freight business from their home. In March 1996, the complainant, appellant's former wife's thirty-year-old daughter, began working with the couple. The complainant testified appellant began making inappropriate comments and

sexual advances toward her during the course of her employment. In June 1996, the complainant encountered appellant sitting on the sofa and masturbating. She attempted to ignore him and walk away, but appellant pulled her over the sofa and pushed her down. Although she fought with him and tried to escape, she testified that appellant held her hands and penetrated her vagina with his penis. Eventually, complainant was able to push appellant away and flee to a neighbor's house. Three days later, complainant told her mother about the incident and then called the police. Appellant left the house and was subsequently arrested.

Discussion

In his first point of error, appellant contends the trial court erred in conducting its in camera hearing, held to determine the admissibility of the complainant's previous sexual conduct, outside of his presence. Specifically, appellant argues he was denied the right to confront the complaining witness in violation of article 1, section 10 of the Texas Constitution, the 6th and 14th amendments to the U.S. Constitution, and article 33.03 of the Texas Code of Criminal Procedure.

The right of an accused to be confronted with the witnesses against him is a constitutional right. *See Carroll v. State*, 916 S.W.2d 494, 496-97 (Tex. Crim. App. 1996). However, it is well settled that even a constitutional right may be waived if not properly preserved. *See Serrano v. State*, 936 S.W.2d 387, 390 (Tex. App. – Houston [14th Dist.] 1996, pet. ref'd); *Cruse v. State*, 882 S.W.2d 50, 52

(Tex. App. – Houston [14th Dist.] 1994, no pet.). A defendant waives his constitutional right to confront witnesses if he does not make a timely and specific objection at trial on the basis of violation of his right to confrontation. *See* TEX. R. APP. P. 33.1(a); *Holland v. State*, 802 S.W.2d 696, 700 (Tex. Crim. App. 1991); *Tapia v. State*, 933 S.W.2d 631, 633 (Tex. App. – Dallas 1996, pet. ref'd). In the present case, the record does not reflect that appellant objected on any grounds to his exclusion from the trial court's in camera hearing. For this reason, and without expressing any opinion on the merits of appellant's contention, we find appellant waived any claim that his exclusion from the in camera hearing violated his right to confrontation. *See Holland*, 802 S.W.2d at 700 (concluding appellant's failure to timely raise express confrontation objection waived any claim that admission of child's out-of-court statement violated his right to confrontation). Accordingly, we overrule appellant's first point of error.

In his second point of error, appellant contends the evidence presented during the guilt/innocence phase of the trial was insufficient to support appellant's conviction for the felony offense of sexual assault.[1] Specifically, appellant argues the State failed to prove lack of consent based on physical force or violence beyond a reasonable doubt.

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[1] Although appellant does not specify whether his point of error addresses the legal or factual sufficiency of the evidence, we assume it is the former because appellant directs this Court to *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979), which outlines the standard applicable in a legal sufficiency review.

When conducting a review of the legal sufficiency of the evidence, we consider all the evidence presented at trial to determine "whether, after viewing the evidence in the light most favorable to the judgment, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Turner v. State*, 805 S.W.2d 423, 427 (Tex. Crim. App. 1991) (citing *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979)). This standard applies regardless of whether the conviction is based on direct or circumstantial evidence. *See Geesa v. State*, 820 S.W.2d 154, 162-63 (Tex. Crim. App. 1991). In assessing the legal sufficiency of the evidence, we are mindful that we are not to "reevaluate the weight and credibility of the evidence, but act only to ensure that the jury reached a rational decision." *Muniz v. State*, 851 S.W.2d 238, 246 (Tex. Crim. App. 1993). Furthermore, the jury is the exclusive judge of the credibility of witnesses and of the weight given their testimony. *See Mosley v. State*, 983 S.W.2d 249, 254 (Tex. Crim. App. 1998), *cert. denied*, 119 S.Ct. 1466 (1999). Likewise, reconciliation of conflicts in the evidence is within the exclusive control of the jury. *See id.*

A person commits the offense of sexual assault if the person intentionally or knowingly causes the penetration of the anus or female sexual organ of another person by any means, without the person's consent. *See* TEX. PEN. CODE ANN. § 22.011(a)(1)(A) (Vernon Supp. 1999). A sexual assault is without the consent of the other person if the actor compels the other person to submit or participate by the use of physical force or violence. *See id.* § 22.011(b)(1). In the present case, the record contains conflicting testimony. However, the complainant testified

that appellant (1) grabbed the complainant from behind and bruised her wrists; (2) pulled the complainant over the sofa and pushed her down; (4) pressed his body weight against her, pinning her knees to her chest and prevented her from fleeing; and (5) held the complainant's hands and penetrated her vagina with his penis. After viewing the evidence in the light most favorable to the verdict, we conclude the jury could have found the essential elements of the offense of sexual assault beyond a reasonable doubt. Thus, the evidence was legally sufficient to support the verdict. We therefore overrule appellant's second point of error.

In his third point of error, appellant contends the trial court erred in refusing to unseal the record of the in camera hearing conducted pursuant to rule 412 of the Texas Rules of Criminal Evidence. Specifically, appellant argues the trial court's failure to unseal the record for the limited purpose of preparing an appellate brief violated his due process rights.

Rule 412 is referred to as the "rape shield law." *See* TEX. R. CRIM. EVID. 412;[2] *Wofford v. State*, 903 S.W.2d 796, 798 (Tex. App. – Dallas 1995, pet. ref'd). Its purpose is to protect a complainant's previous sexual conduct from exposure, except in limited circumstances. *See Wofford*,

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[2] We note that on March 1, 1998, the Texas Rules of Criminal Evidence and the Texas Rules of Civil Evidence were replaced by the Texas Rules of Evidence, which now apply to all cases going to trial after March 1, 1998. However, because the Texas Rules of Criminal Evidence were in effect when appellant went to trial in 1996, all references to the rules are to the former version.

903 S.W.2d at 798. The in camera hearing required by rule 412(c) allows the trial court to determine privately whether to admit evidence of the complainant's past sexual behavior and to limit any related questioning. *See id.* In *Kesterson v. State*, 959 S.W.2d 247 (Tex. App. – Dallas 1997, no pet.), the appellant appealed the trial court's denial of his motion to allow counsel to review sealed portions of the record. *See id.* at 247. As in the present case, the appellant in *Kesterson* sought to have the record of an in camera hearing conducted pursuant to rule 412(c) unsealed for review in order to prepare his appellate brief. *See id.* The Dallas Court of Appeals held that "an appellant is not entitled to review the sealed record from an in camera hearing conducted pursuant to rule 412 to determine what complaints to raise on appeal." *Id.* at 249. The *Kesterson* court stated:

> We are cognizant of the fact that without the record of the in camera hearing, appellant will be unable to make specific references in his brief to the testimony from the hearing. Nevertheless, this will not unduly hinder appellant in preparing any complaints he may have regarding the testimony presented at the hearing. Appellant can still identify what he believes was the general nature of the testimony involved and discuss why he believes the trial court erred in its ruling. Appellant can also identify the place in the statement of facts where this Court will find the trial court conducted the in camera hearing. In short, appellant may brief any complaints he has in light of the record available to him.

Id. at 248. We find this reasoning persuasive. After reviewing the in camera testimony in light of the complaints appellant raises on appeal, we conclude the trial

court did not err in refusing to unseal the record. Consequently, we overrule appellant's third point of error.

In his fourth point of error, appellant contends he was denied a fair trial due to ineffective assistance of counsel. Specifically, appellant argues his counsel was ineffective because counsel failed to properly preserve error in connection with the trial court's order to exclude evidence of complainant's prior sexual conduct.

The standard of review for ineffective assistance of counsel claims requires a two-step analysis. *See Strickland v. Washington*, 466 U.S. 668 (1984); *McFarland v. State*, 928 S.W.2d 482, 500 (Tex. Crim. App. 1996); *Moore v. State*, 983 S.W.2d 15, 20 (Tex. App. – Houston [14th Dist.] 1998, no pet. h.). First, the appellant must demonstrate counsel's representation fell below an objective standard of reasonableness under prevailing professional standards. *See Strickland*, 466 U.S. at 688. Counsel's competence is presumed, and the appellant must rebut this presumption by identifying the acts or omissions alleged to constitute ineffective assistance and affirmatively prove they fell below the professional standard of reasonableness. *See McFarland*, 928 S.W.2d at 500; *Moore*, 983 S.W.2d at 20. An ineffectiveness claim cannot be demonstrated by isolating any portion of counsel's representation, but must be judged on the totality of the representation. *See Strickland*, 466 U.S. at 695. Second, the appellant must establish that counsel's performance was so prejudicial that it deprived appellant of a fair trial. *See id.* To satisfy this prong, appellant must show that reasonable probability exists that, but for counsel's unprofessional errors, the fact-finder would have reasonable doubt with respect to guilt. *See McFarland*, 928 S.W.2d at 500; *Moore*, 983 S.W.2d at 20.

Reasonable probability means a probability sufficient to undermine confidence in the outcome, and appellant has the burden of making this showing by a preponderance of the evidence. *See Strickland*, 466 U.S. at 694.

Contrary to appellant's assertions, the sealed record of an in camera proceeding preserves any complaints regarding the sealed testimony for appellate review. *See Kesterson*, 959 S.W.2d at 248. In the present case, the sealed record of the in camera hearing was forwarded to this Court for appellate review. Thus, appellant's trial counsel did not fail to preserve error regarding complainant's excluded testimony. Accordingly, we overrule appellant's fourth point of error.

We affirm the judgment of the trial court.

/s/ Paul C. Murphy
Chief Justice

Judgment rendered and Opinion filed July 29, 1999.

Panel consists of Chief Justice Murphy and Justices Anderson and Hudson.

Do Not Publish – TEX. R. APP. P. 47.3(b).

CAUSE NO. 14-96-01317-CR

ROBERT PAUL MCNASPY, PETITIONER	§	IN THE COURT OF APPEALS
VS.	§	FOR THE FOURTEENTH DISTRICT OF THE STATE OF TEXAS
THE STATE OF TEXAS	§	

MOTION TO STAY EXECUTION OF MANDATE

TO THE HONORABLE JUSTICES OF THE FOURTEENTH COURT OF APPEALS;

COMES NOW, ROBERT PAUL MCNASPY, PETITIONER, in the above-entitled and numbered cause, and move the Court to stay the issuance of its mandate of affirmance in this cause, and in support thereof, would respectfully present the following:

I.

The Petitioner was tried and convicted in the 228th Criminal District Court of Harris County, Texas of the offense of sexual assault and punishment was assessed by the jury at ten years confinement in the Texas Department of Corrections. This conviction was confirmed by the Court of Appeals for the Fourteenth District of Texas on July 29, 1999. A Motion for Rehearing was overruled by the Court of Appeals for the Fourteenth District of Texas on October 21, 1999. A Petition for Discretionary Review was overruled by the Court of Criminal Appeals for the State of Texas on April 12, 2000. Copies of these opinions are attached to this motion.

II.

The Petition for Discretionary Review to the Court of Criminal Appeals for the State of Texas presented a substantial federal question: Is the constitutional right of a Defendant to be present when witnesses against him are being examined waived by his lawyers failure to timely object?

The U.S. Supreme Court has held in various cases that where the accused failed to make a timely objection to a judge's denial of the opportunity to be present at a particular stage of the proceedings, such failure constituted a waiver of the accused's right to contend subsequently that his right to be present had been violated. However, these cases all deal with the right to be present at phases of the trial other than during the examination of witnesses and that is the issue in the instant case. The only exception to the constitutional rule requiring the Defendant to be present during examination of witnesses is where the Defendant's own disruptive actions prevent the trial from being able to proceed. (*Illinois v. Allen* (1970) 397 US 337, 25 Led 2nd 353, 90 S Ct. 1057).

Thus, in *Snyder v. Massachusetts*, (1934) 291 US 97, 78 L Ed 674, 54 S Ct. 330, 90 ALR 575 (overruled on other grounds *Malloy v. Hogan*, 378 US 1, 12 L Ed 653, 84 S Ct. 1489, the court noted that so far as the Fourteenth Amendment was concerned, the presence of a defendant was a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only; that it was necessary to determine whether under the circumstances of a particular case the enforced absence of the defendant was so flagrantly

unjust that the Federal Constitution forbade such absence; and that the Fourteenth Amendment did not say in so many words that a defendant must be present every second or minute or even every hour of the trial. While recognizing that a defendant in a criminal case had the right to be present at a trial when evidence was offered, so that he would have the opportunity to advise with his counsel and cross-examine the witnesses against him, *the court stated that confusion would result if the privilege of presence were identified with the privilege of confrontation, which was limited to the stages of the trial when there were witnesses to be questioned.* (Emphasis added).

A substantial constitutional question is presented in the defendant's Writ of Certiorari. The U.S. Supreme Court should grant the writ in order to instruct the courts of Texas that due process of law requires that a defendant always be present during examination of witnesses, defendants own disruptive behavior preventing a trial going forward, being the only exception. This Sixth Amendment constitutional right is carried to the states via the Fourteenth Amendment. Failure of his attorney to object is not an exception to the right of confrontation and Texas law to the contrary should be reviewed by the U.S. Supreme Court. The Supreme Court has emphasized that the accused's right to be present at his trial cannot properly be based upon the confrontation clause of the Sixth Amendment except to the extent that such right is asserted in connection with a stage of the trial at which there are witnesses to be questioned.

Good cause exists to request that this court stay the issue of the mandate pending the hearing of the application for a Writ of Certiorari in the U.S. Supreme Court.

Attached hereto is the report from Dr. Allen L. Cos, Jr., M.D., of 2400 Hospital Drive, Bossier City, Louisiana, stating that facts concerning the movant's medical condition. As can be seen therein, Mr. McNaspy was recently diagnosed with Hepatitis C. At this time he has been referred to Dr. Douglas Rimmer to be followed up on June 5, 2000 to determine treatment. Preventing this early work up of what treatment and medications are required could have serious, possible fatal, consequences. Although treatment is available in the county jail, where Mr. McNaspy would await the results of the writ application, they are unable to perform the critical early diagnosis and prescription of medications as well as the institutions with whom Mr. McNaspy is current treating. For further good cause, if any be needed, Mr. McNaspy lives with his friends, Mr. and Mrs. Donald S. Wille, sixty-eight and seventy years old respectively, and their mentally disabled son, Donny. His financial assistance as well as physical assistance will both be terminated if this stay is not granted causing great hardship to these third parties. Mrs. Wille has had seven bypass surgeries and needs daily assistance that her husband, a disabled veteran, cannot give.

III.

The Petitioner intends to diligently and timely petition the United States Supreme Court to review this substantial federal question.

IV.

If the Court does not issue an order staying the execution of the mandate in this cause, the Petitioner will suffer the execution of this sentence without having had the opportunity to submit the substantial federal question detailed above to the Supreme Court for review.

WHEREFORE, the Petitioner prays that the Court stay the issuance of the mandate in this cause for a period of ninety (90) days to permit the Petitioner an opportunity to timely file a Petition for Writ of Certiorari to the United States Supreme Court.

Respectfully submitted,

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ATTORNEY FOR PETITIONER

CERTIFICATION OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent by certified mail, return receipt requested to all interested parties on this the 4th day of May, 2000.

/s/ S. John Odom
S. JOHN ODOM

CAUSE NO. 14-96-01317-CR

ROBERT PAUL MCNASPY, PETITIONER	§	**IN THE COURT OF APPEALS**
VS.	§	**FOR THE FOURTEENTH DISTRICT OF THE STATE OF TEXAS**
THE STATE OF TEXAS	§	

ORDER

ON THIS DAY, came to be considered Petitioner's Motion to Stay Execution of the Mandate, and it appears to the Court that this motion should be **GRANTED/ DENIED.**

IT IS THEREFORE, ORDERED that the mandate in the above-entitled and numbered cause be stayed for a period of sixty (60) days and not issue until _____, 2000.

/s/ _____
JUDGE PRESIDING

OFFICIAL NOTICE FROM COURT OF
CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION,
AUSTIN, TEXAS 78711

April 12, 2000 DUPLICATE ORIGINAL
COA#: 14-96-01317-CR
RE: Case No. 0005-00
STYLE: MCNASPY, ROBERT PAUL

On this day, the Appellant's Petition for Discretionary Review has been REFUSED.

Texas Rules of Evidence

Rule 412. Evidence of Previous Sexual Conduct In Criminal Cases

(a) Reputation or Opinion Evidence. In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, reputation or opinion evidence of the past sexual behavior of an alleged victim of such crime is not admissible.

(b) Evidence of Specific Instances. In a prosecution for sexual assault or aggravated sexual assault, or attempt to commit sexual assault or aggravated sexual assault, evidence of specific instances of an alleged victim's past sexual behavior is also not admissible, unless:

(1) such evidence is admitted in accordance with paragraphs (c) and (d) of this rule;

(2) it is evidence:

(A) that is necessary to rebut or explain scientific or medical evidence offered by the State;

(B) of past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior which is the basis of the offense charged;

(C) that relates to the motive or bias of the alleged victim;

(D) is admissible under Rule 609; or

(E) that is constitutionally required to be admitted; and

(3) its probative value outweighs the danger of unfair prejudice.

(c) **Procedure for Offering Evidence.** If the defendant proposes to introduce any documentary evidence or to ask any question, either by direct examination or cross-examination of any witness, concerning specific instances of the alleged victim's past sexual behavior, the defendant must inform the court out of the hearing of the jury prior to introducing any such evidence or asking any such question. After this notice, the court shall conduct an in camera hearing, recorded by the court reporter, to determine whether the proposed evidence is admissible under paragraph (b) of this rule. The court shall determine what evidence is admissible and shall accordingly limit the questioning. The defendant shall not go outside these limits or refer to any evidence ruled inadmissible in camera without prior approval of the court without the presence of the jury.

(d) **Record Sealed**. The court shall seal the record of the in camera hearing required in paragraph (c) of this rule for delivery to the appellate court in the event of an appeal.

(e) **Sexual Conduct of Child as Defense**. This rule does not limit the right of the accused to produce evidence of promiscuous sexual conduct of a child 14 years old or older as a defense to sexual assault, aggravated sexual assault, indecency with a child or an attempt to commit any of the foregoing crimes if such evidence is admitted, the court shall instruct the jury as to the purpose of the evidence and as to its limited use.

Federal Rules of Evidence

RULE 412. SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM'S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION

(a) Evidence Generally Inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury or other physical evidence;

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) evidence the exclusion of which would violate the constitutional rights of the defendant.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged

victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to Determine Admissibility.

(1) A party intending to offer evidence under subdivision (b) must –

(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause, requires a different time for filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

U.S. Const.

AMENDMENT VI – JURY TRIAL FOR CRIME, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.